Supreme Court, U.S.
FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1703 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH LANCASTER,

Petitioner,

– against –

BUERKLE BUICK HONDA COMPANY,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether § 7(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b) prescribes the exclusive manner by which a waiver may bar a subsequent suit under that statute?

PARTIES TO THE PROCEEDING

Petitioner:
Kenneth Lancaster

Respondent:
Buerkle Buick Honda Company

Amicus Curiae:
American Association of Retired Persons

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITIONER

The American Association of Retired Persons, "AARP", supports the petitioner's request for the issuance of a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding.

I. INTRODUCTION

A. *STATEMENT OF INTEREST OF AMICUS CURIAE*

The American Association of Retired Persons, "AARP", of 1909 K Street, N.W. Washington, D.C. 20049, is a not-for-profit membership corporation of more than 25 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force.

In keeping with its purposes, AARP has worked to alleviate age discrimination in employment as well as other aspects of life. During the past several years, the number of age discrimination charges[1] and lawsuits[2] has greatly multiplied. In response, many employers rely upon release agreements to obtain waivers of rights and claims from their older employees in an effort to avoid litigation.[3] Since the precise legal standard by which ADEA claims may be compromised is of paramount importance to AARP's members,[4] AARP submits this brief *amicus curiae* in support of the petition for a writ of *certiorari*.

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[1] From 1982 to 1985, age discrimination charges filed with the Equal Employment Opportunity Commission, ("EEOC") increased by 52 per cent. *See* Aging Services News at 109 (July 17, 1986).

[2] *See* Schuster & Miller, "An Empirical Assessment of the Age Discrimination in Employment Act," 38 Indus. & Labor Rel. Rev. 64 (1984).

[3] "How Using Releases Helps Avoid Age Discrimination Litigation," Nat'l L.J., June 17, 1985 at 17.

[4] In addition to its *amicus* participation in the court below, AARP submitted written comments to the Equal Employment Opportunity Commission, ("EEOC") on the subject of waivers under the ADEA. *See* 50 Fed. Reg. 40, 870 (1985).

B. *PRELIMINARY STATEMENT*

The issue in this case which merits review by this Court concerns the proper standard for determining the legality of a waiver of rights under the Age Discrimination in Employment Act of 1967, "ADEA", 29 U.S.C. § 621 *et seq*. The ADEA, by incorporating § 16(c) of the Fair Labor Standards Act of 1938, "FLSA"[5] explicitly provides the manner in which ADEA rights may be waived. *See* 29 U.S.C. §§ 216(c), 626(b). Under § 16(c) of the FLSA, an agreement supervised by the authorized agency constitutes a valid waiver.[6] By its express terms, the ADEA sets forth a standard for determining the validity of a waiver of ADEA rights.

Before the Eighth Circuit below, Petitioner raised the applicability of § 16(c), the general FLSA prohibition against waivers, and the voluntary and knowing standard. In reviewing Petitioner's arguments, the Eighth Circuit did not cite to,

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[5] FLSA § 16(c), 29 U.S.C. § 216(c) provides in pertinent part:

> The Secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under § 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

This provision was specifically intended to create an incentive for employers to voluntarily enter into release agreements, *see* S. Rep. No. 640, 81st Cong. 1st Sess., reprinted in [1949] U.S. Code Cong. Serv. 2241, 2249, and to facilitate expeditious resolution of wage disputes without litigation. *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977).

[6] Pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), the Equal Employment Opportunity Commission assumed responsibility for administration and enforcement of the ADEA from the Secretary of Labor. The Reorganization Plan has been ratified by Congress. Pub L. No. 98-532, 98 Stat. 2705 (1984).

and in any event did not follow, § 16(c) of the FLSA.[7] While the decision below mentions the standard applied by this Court that generally prohibits waivers of rights under the FLSA, it tersely dismissed the FLSA standard. *See Barrentine v. Arkansas - Best Freight System, Inc.*, 450 U.S. 728, 745 (1981); *D.A. Schnulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945). The Eighth Circuit ultimately relied on the voluntary and knowing standard applied to Title VII cases, although it seemed to create another standard altogether, based solely on ordinary contract principles. Unless it is set aside, the decision below will cause uncertainty and confusion as to the proper standard and procedure applicable to ADEA waivers. Consequently, Supreme Court review is necessary to clarify this important issue.

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[7] The decision of the Eighth Circuit below is reported at 809 F.2d 539 and relies on *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986). *Moore* does not contain any mention or analysis of § 16(c) of the FLSA and disposes of FLSA caselaw in one sentence.

REASONS FOR GRANTING THE WRIT

I. THE STANDARD FOR DETERMINING THE VALIDITY OF ADEA WAIVERS IS A CRITICAL QUESTION OF LAW WHICH THIS COURT SHOULD RESOLVE

In enacting the Age Discrimination in Employment Act of 1967, ("ADEA"), 29 U.S.C. § 621 *et seq.*, Congress incorporated the procedural and remedial provisions of the Fair Labor Standards Act of 1938, ("FLSA"), 29 U.S.C. § 201 *et seq.*, and adopted the substantive prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. Lorillard v. Pons*, 434 U.S. 575, 585 (1978). The ADEA is a hybrid statute which proscribes arbitrary age discrimination in employment through a procedural scheme that scrupulously protects the rights of older workers. The question of whether the FLSA, Title VII, or some other standard determines ADEA rights has often resulted in inconsistent interpretations of the ADEA.[8] This case underscores the need for the Court to set forth definitive guidance concerning the manner in which ADEA claims and rights may lawfully be compromised.

"The question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank v. O'Neil*, *supra*, 324 U.S. at 705. Section 7(b) of the ADEA[9] incorporates

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[8] *See, e.g., Lorillard v. Pons*, *supra*, 434 U.S. at 577, n.3 (1978) (jury trials).

[9] ADEA, § 7(b) provides in part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217). . . .

29 U.S.C. § 626(b).

§ 16(c) of the FLSA which sets forth a specific procedure for waivers of statutory claims and rights. Section 16(c) provides that a waiver is valid and enforceable when supervised by the enforcing agency. 29 U.S.C. § 216(c). The proper inquiry for analyzing a waiver of FLSA rights is whether the waiver is in accordance with § 16(c), *Sneed v. Sneed's Shipbuilding, Inc., supra*, 545 F.2d at 539, which constitutes the only means by which FLSA rights may be compromised outside of litigation and a court settlement. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982).

Another standard for determining the validity of waivers has derived from this Court's holdings that a waiver of rights under the FLSA is generally prohibited.[10] *D.A. Schulte, Inc. v. Gangi, supra; Brooklyn Savings Bank v. O'Neil, supra; See also Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas - Best Freight System, Inc., supra*, 450 U.S. at 745. In *Runyan v. National Cash Register Corp.*, 759 F.2d 1253 (6th Cir. 1985), *vacated and rev'd* 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 107 S. Ct. 178 (1986), the Sixth Circuit carved out an exception to this Court's no waiver rule as applied to ADEA release agreements.[11] In that

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[10] The Court has recognized § 16(c) as an exception to the general prohibition against waivers. *Barrentine v. Arkansas-Best Freight System, Inc., supra*, 450 U.S. at 740, n.17 (1981).

[11] In *Runyan*, a panel of the Sixth Circuit first held that the ADEA prohibited a waiver or release of an individual's rights absent supervision or approval by the Equal Employment Opportunity Commission ("EEOC"). 759 F.2d 1253. The decision analyzed the statutory language of the ADEA and relied on Supreme Court caselaw which firmly established that the ADEA incorporated the enforcement provisions of the Fair Labor Standards Act of 1938, ("FLSA"). The court reasoned that since the FLSA unquestionably prohibited unsupervised waivers and releases, the ADEA must similarly prohibit unsupervised waivers. *Id.* On rehearing by the full Sixth Circuit, the court reversed itself. The Court based its holding on the peculiar facts in the case, emphasizing that the plaintiff was a labor law attorney who had negotiated the substance of the release agreement. *Runyan's* facts are unique and are distinguishable from those at bar.

case, the court concluded that the holdings in *O'Neil* and *Gangi*[12] did not resolve the issue of waivers involving bona fide factual disputes. 787 F.2d at 1044. Thus, while the court's analysis derives from the FLSA and its caselaw, the decision permits waivers under particular circumstances.

In addition to these FLSA standards for waivers, the courts have also established stringent standards for waivers of civil rights, such as those under Title VII. In Title VII cases,[13] a waiver is permitted where the employer can prove the waiver was voluntary and knowing.[14] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15 (1974). Certain district courts have relied on Title VII precedent and undertaken exacting inquiries into the parties' intentions in analyzing whether the waiver of ADEA rights was enforceable. *Valenti v. International Mill Service, Inc.*, *supra*, 610 F. Supp. at 37-38; *Valenti v. International Mill Service, Inc.*, 634 F. Supp. 57, 69-60 (E.D. Pa. 1985), *appeal docketed*, Nos. 86-1600, 1601 (3d Cir. Sept. 25, 1986); *EEOC v. United States Steel Corp.*, 583 F. Supp. 1357 (W.D. Pa. 1984).

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[12] In *O'Neil*, the employee had released all of his rights under the FLSA in exchange for overtime compensation due him. The employee later sued for liquidated damages under the FLSA. The Court held that the release agreement did not bar a suit for liquidated damages. 324 U.S. at 706-08. In *Gangi*, the Court extended this no waiver rule to apply in disputes over the FLSA's coverage. 328 U.S. at 114-116.

[13] Two approaches with varying degrees of scrutiny have evolved under the voluntary and knowing standard – a plain meaning rule versus a totality of the circumstances analysis. *See* Note, "Waiver of Rights Under the Age Discrimination in Employment Act of 1967," 86 Colum. L. Rev. 1067, 1072-1073 (1986).

[14] The Equal Employment Opportunity Commission has proposed a regulatory exemption to the ADEA which would allow the voluntary and knowing standard to be applied in ADEA waiver cases. *See* 50 Fed. Reg. 40, 870 (1985). This appears to represent a change in Commission policy as the Commission had previously argued that an unsupervised waiver was invalid, in accordance with the FLSA § 16(c) standard. *See Valenti v. International Mill Service, Inc.* 610 F. Supp. 36, 37 (E.D. Pa. 1985).

The Eighth Circuit's decision rejects the FLSA standards[15] and does not appear to faithfully adopt the Title VII standard. On its face, the decision does not recognize the existence of § 16(c) of the FLSA as part of the ADEA statutory scheme. In addition, the court expressly rejects this Court's holdings in *Gangi* and *O'Neil* as dispositive of ADEA waiver cases. And, while mentioning the Title VII standard, the court's minimal analysis strays from the stringent requirements of the voluntary and knowing standard applied in other ADEA cases. *See Valenti v. International Mill Service, supra; EEOC v. United States Steel Corp., supra.* Instead, the Eighth Circuit, appears to create another standard consisting of the application of ordinary contract principles to determine the validity of ADEA waivers.

The absence of a consistent standard for determining the validity of ADEA waivers is not an abstract or theoretical problem. It will necessarily have substantial practical consequences for employees and employers alike. Many older workers, like Petitioner in this case, are unaware of their rights,[16] financially insecure,[17] and more likely than younger workers to face bleak

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[15] The decision essentially ignores the holdings of *Lorillard v. Pons*, 434 U.S. 575 (1978), and *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985), which held that the specific enforcement procedures in § 16 of the FLSA are expressly incorporated into the ADEA. In refusing to follow or distinguish *Gangi* or *O'Neil*, the Eighth Circuit further undermines the import of *Lorillard* and *Thurston* which recognize that the ADEA's incorporation includes FLSA case law on questions of judicial interpretation of the ADEA's procedural provisions.

[16] A 1981 Louis Harris survey conducted by the National Council on Aging indicated that more than 50% of all workers in the protected class (40-70) were unaware of the protections afforded by the ADEA. Such statistics, standing alone, indicate that more than half of all protected class members, such as Petitioner, could not execute a knowing and voluntary waiver without additional information and advice.

[17] Many older workers, particularly in Petitioner's age group, 50-55, are without the security of a vested retirement income. A 1985 Government Accounting Office Report, HRD-85-81 (July 15, 1985), found that only 2.2% of males age 53 were entitled to pension benefits.

prospects for reemployment.[18] The discrimination most commonly experienced by older workers is termination, forced retirement or layoff,[19] in the context of which release agreements are frequently used,[20] as in the case here.

Moreover, employers are receiving instruction in how to obtain waivers[21] as a direct result of the decision in this case[22] and are increasingly using waivers as a preferred practice in their dealings with older workers.[23] The Eighth Circuit's decision here will exacerbate the uncertainty and confusion which older workers and their employers face when entering into termination and release agreements. In light of the use of the decision below as a model in other ADEA compromise settings, the need for guidance by this Court concerning the appropriate standard for determining the validity of waivers under the ADEA is an especially timely and compelling reason for granting *certiorari* in this case.

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[18] According to a Bureau of Labor Statistics study on displaced older workers, reemployment of displaced workers declines significantly with age. The study found that only 41% of those between the ages of 55-60 were able to reenter the labor force in any capacity, compared to 70% for those between the ages of 20-24. *Displaced Workers 1979-83*, U.S. Department of Labor, Bureau of Labor Statistics, July 1985, Bulletin 2240.

[19] Sixty-eight percent of the age discrimination charges filed with the EEOC in 1985 consisted of termination on layoff claims. *See Aging Services News*, 109 (July 17, 1986). *See also*, Schuster & Miller, *supra* note 2, at 71 (discharge and involuntary retirement comprise 67% of age discrimination litigation surveyed).

[20] *See e.g., Runyan, supra; Valenti v. International Mill Services, supra; EEOC v. United States Steel Corp., supra; Anderson v. Montgomery Ward & Co.*, 650 F. Supp. 1480 (N.D. Ill. 1987).

[21] "How Using Release Helps Avoid Age Discrimination Litigation", Nat'l L.J., June 17, 1985, at 17, 28-29.

[22] *See Fair Employment Practices Summary* (BNA); "Age Claim Releases: Pointers and Pitfalls," at 24 (Feb. 19, 1987).

[23] *See Fair Employment Practices Summary* (BNA) "Living with the Age Act Amendments," (Jan. 22, 1987).

CONCLUSION

For the foregoing reasons, *amicus curiae* AARP urges that the petition for a writ of *certiorari* be granted.

Dated: New York, New York
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Respectfully submitted,

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